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SUPREME COURT OF THE UNITED STATES

October Term, 1946

No. 300

LILLIAN B. EVERETT, - - - - - - *Petitioner,*

VERSUS PETITION FOR REHEARING

WALLIS W. DOWNING, - - - - - - *Respondent.*

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner respectfully moves the Court for an order to allow a rehearing of the above entitled cause, and in support of said motion, says:

Your petitioner is well aware that there has already been a motion for rehearing asked, and that it was denied by this Honorable Court.

In justification of your petitioner's effort to have this Honorable Court review the decision of her case rendered by the Court of Appeals of Kentucky, your petitioner respectfully refers the Court, as a cogent precedent, to the case of Emigrant Aid Society v. Adams County, 100 U. S. 61, in which this Court en-

tertained a motion for a re-argument two years and nine or ten months after its determination of said cause, and reversed its previous decision.

This Court saw the necessity for revising its own opinion after the expiration of nearly three years. How much more should the injustice sustained by your petitioner herein in the State Courts, be considered by this Honorable Court in order to rectify the grievous wrong to which your petitioner has been subjected?

In the case of the Emigrant Aid Society, counsel for the Society was asked by this Court: "How many rehearings should a court permit in a given case?" to which counsel, Mr. Benjamin Franklin Butler, replied: "In the abstract, as many hearings as are necessary to establish the truth and justice of the case."

Though the present motion presented by your petitioner is founded upon different considerations of fact, as well as law, your petitioner requests permission to call the attention of this Honorable Court to the photostatic copies of the record which she attaches, which greatly strengthen her contention.

Your petitioner respectfully requests permission to call attention to the practice of this Honorable Court as defined by Mr. Justice Van Devanter to the Congress of the United States, on page thirty-two of "PROCEDURE IN FEDERAL COURTS, hearing before a subcommittee of the Committee on the Judiciary, United States Congress, first session, sixty-eighth congress, on S 2060, A BILL TO AMEND THE JUDICIAL CODE, and S 2061, A BILL TO GIVE THE SUPREME COURT AUTHORITY TO MAKE AND PUBLISH RULES IN COMMON LAW PRACTICE, Feb. 2, 1924," as follows:

"When I speak of a discretionary jurisdiction on certiorari I do not mean of course that the Supreme Court merely exercises a choice or will in granting or refusing the writ, but that it exercises a sound judicial discretion, gives careful thought to the matter in the light of the supporting and opposing briefs, and resolves it according to recognized principles."

It is respectfully urged that this Honorable Court has been denied the opportunity for a fair consideration of your petitioner's cause by reason of the misstatements in the brief of opposing counsel.

Mr. Justice Van Devanter was asked:

"Even though a majority be against it?

"Yes. For instance, if there were five votes against granting the petition and four in favor of granting it, it would be granted, because we proceed upon the theory that when as many as four members of the court, and even three in some instances, are impressed with the propriety of our taking the case the petition should be granted. This is the uniform way in which petitions for writs of certiorari are considered."

POINTS URGED

1. THE ERRORS AND DISCREPANCIES IN THE OPPONENT'S BRIEF
   - (a) The Petition Was Filed In Time.
   - (b) The Federal Question Was Raised In Both Lower Courts.
2. THE OPINION OF THE COURT OF APPEALS OF KENTUCKY IS CONTRARY TO THE LAW AND THE FACTS SHOWN BY RECORD

(a) The Law Is Misstated, and Misapplied.

(b) Authorities For Respondent Do Not Apply.

3. IRREGULAR PROCEEDINGS IN THE COURT OF APPEALS OF KENTUCKY

(a) Papers in File Were Altered After Denial of Appeal.

(b) The Order of Denial of Appeal, June 11, 1946, is Missing From the File.

(c) The Special Session of July 15, 1946, After Petitioner Had Forwarded Petition for Certiorari to This Court, Was Without Notice To, or Knowledge of Petitioner.

STATEMENT OF CASE

To make the reasons why the present motion should be granted especially apparent to the Court, it will be convenient, if not necessary, to succinctly state the case.

Your petitioner in 1927 suffered an accident which resulted in a severe injury to her brain, and caused her confinement in an infirmary for several years, during all of which time she was in a state of incompetency and unable to take care of her affairs, or to comprehend the most ordinary matters.

While in that condition and in the infirmary at Hot Springs, Arkansas, your petitioner was offered $10,000 in settlement for her injuries, which her attending physician, Dr. J. L. Greene, refused to allow her to accept as being insufficient, stating that she

should have $20,000 out of court, without paying an attorney's fee.

Consequently, she was placed in care of the railroad agent and invalided to Louisville, with written memoranda from the physician to call friends to see her, and to call the railway representative.

The agent came and said that he had no authority to offer more than $10,000, but would consult his superiors in Indianapolis and return Friday, it then being Tuesday.

Your petitioner was then seen by the then Assistant United States District Attorney, Mr. Claude Hudgins, whom she had known, who, after seeing her concluded that she was incompetent and incapable of making a binding contract, and stated he would return the following morning.

The same day after he had left the respondent, a lawyer whom your petitioner had never known or heard of, came to her room with a prepared contract, and in the conditions described in the evidence obtained her signature to the alleged contract of employment, before the return of her friend Mr. Hudgins, or the railroad representative.

Upon advice of the respondent, a few days later petitioner was invalided back to Hot Springs.

Your petitioner arrived in Hot Springs, November 24, 1928, in a dazed and helpless condition. She, fortunately, was seen by the Superintendent of the infirmary, Sister Bernard, who was alighting from the same train, who took her in charge.

Thereafter, in March, 1929, Dr. J. L. Greene, planning to leave early in May for the summer, requested a business talk with the respondent so he could discuss her condition and affairs.

The respondent thereafter took the depositions,

in person, April 17, 1929, of Dr. Greene and his assistant, Dr. Scully, which were excluded by the trial court.

These depositions are the only evidence taken by respondent of petitioner's condition, and were his sole reliance for the compromise.

Soon thereafter, Dr. Greene, on seeing a bill from the respondent, asked to see the alleged contract, then instructed a nurse to "write that man for her," as he was indignant at its provisions, and Miss Bird, nurse, did so.

To respondent's replies the attendants wrote him that his letters were evasive and unsatisfactory. Then he came in person on a vacation, he said, and in the absence of Dr. Greene (see deposition of Miss Margaret Green. Photo. Ex. 1), induced petitioner to sign an alleged authorization for settlement of $20,000, though she was then thirty-two years old, and had been earning $2,400 per year, and respondent was fully advised of her permanent loss of earning power.

Later, relying solely upon the depositions of Drs. Greene and Scully, taken by himself, respondent compromised petitioner's claim for $20,000, the sum that Dr. Greene had said the previous Fall she should have, without an attorney, although her condition had since then grown much worse, as shown by both Drs. Greene and Scully, in their depositions to respondent, April, 1929, the latter stating: "She has grown steadily worse, however." Ex. 2, Dr. J. H. Baldwin's deposition.

Having written that he had no offer from the railway company, upon the visit referred to the respondent said to your petitioner:

"When you get your money I'd like to invest it for you," to which she replied:

"Someone will have to."

On this same visit the respondent talked with Sister Sebastian, and other attendants, and visited petitioner at her bedside. The Sister says that the respondent had opportunity of observing petitioner's condition himself:

> "Oh, yes, I am sure he would have because anyone talking to Miss Everett, if they had any power of observation at all, would have observed it." Photo. Ex 2, A. 31.

Later the respondent sent a check for $20,000 payable to, and endorsed by him, Photo. Ex. 3, to the Arkansas Trust Company, instructing them to deposit the net proceeds and to remit his fee.

Thereupon, Mr. Dewell Jackson, acting for the bank and for the respondent, under instructions from respondent that he would have to call at the infirmary as she was unable to leave same, called there and obtained your petitioner's signature to the alleged "mutual release" under circumstances described in his deposition. Hot Springs Depositions, Ex. 4, P. 46.

Thereafter, in keeping with his previous statement, "I'd like to invest your money for you when you get it," notwithstanding his observation and information of her incompetency, respondent wrote a lengthy letter discussing various investments which your petitioner could neither read nor understand because of her physical and mental incapacity. This is shown by all of Hot Springs depositions.

Receiving no response, respondent wired your petitioner, to which Sister Sebastian replied by wire, in the name of your petitioner:

> "You know the circumstances, you will just have to use your own judgment about buying . . . Have not gone into your letters." Photo. Ex. 2, A. 36.

In the face of this warning, the respondent invested petitioner's money in speculative stocks.

Petitioner's sister, on a short visit to Louisville from California, Photo. Ex. 5, learning of the investments made by respondent of petitioner's money, remonstrated with him in July, 1929, while much of the funds remained intact.

Ignoring this protest, respondent invested the balance in highly speculative stocks in September, 1929.

Her call was after the first, but before the final investment of petitioner's funds by respondent.

The trial court, and the Court of Appeals excluded this evidence as being after the transactions.

Your petitioner had no possession, except by respondent's acts, of said securities for several years later, and upon attempting to get a loan on same, she learned they were worthless, as shown by Mr. Owens', an attorney of Little Rock, Arkansas, in his deposition. Also Photo Ex. 12, Pa. 2.

1. THE MISTAKES AND DISCREPANCIES IN RESPONDENT'S BRIEF

Your petitioner respectfully requests permission to call this Honorable Court's attention to the opposing brief in this cause heretofore filed, and to show that such parts of the record as are wanted, or may serve some particular purpose, have been taken from the file in the office of the Clerk of the Court of Appeals of Kentucky and referred to in said brief to this Honorable Court, thus giving a distorted picture.

On page one, literary paragraph two of opposing brief, the respondent states:

"On behalf of respondent we have procured and filed with the Clerk of the United States Supreme Court a certified copy of orders entered in the action by the Court of Appeals of Kentucky."

The copies of the orders supplied by your petitioner's opponent were without any previous notice to her, and copy was not supplied to her. (See affidavit of your petitioner, Ex. 6, and that of her former counsel, Reuben Ruthenburg. Ex. 7.)

Your petitioner respectfully directs the attention of this Honorable Court to photostatic copies of the files in the office of the Clerk of the Court of Appeals of Kentucky; to the fact that these papers procured in behalf of the respondent do not reflect the actual state of the proceedings in the Court of Appeals of Kentucky in this cause of action.

Your petitioner has obtained a copy of the "ORDERS—KENTUCKY COURT OF APPEALS" from the office of the Clerk of the Supreme Court of the United States, and observing the matter was presented to this Court in a different light than that reflected by the record, petitioner obtained photostatic copies of the Step Sheet on file in the office of the Clerk of the Court of Appeals of Kentucky, as well as photostatic copy of several of the other papers in the file in said Court, and respectfully requests permission to call the attention of this Honorable Court to the certificate attached to the fifteen pages of papers styled, "ORDERS—KENTUCKY COURT OF APPEALS" filed in the Clerk's office of this Honorable Court, which certificate, page fifteen, reads as follows:

"COMMONWEALTH OF KENTUCKY
COURT OF APPEALS.....SCT.

I, E. E. Hughes, Clerk of the Court of Appeals do hereby certify that the foregoing is a true and correct copy of orders entered in the case of Everett v. Downing, appeal from Jefferson Circuit Court as the same appears from the records and files of my office.

Witness my hand and seal of office this the 14th day of August, 1946.

E. E. Hughes
Clerk of the Court of Appeals
Of Kentucky

(SEAL)
COURT OF APPEALS."
KENTUCKY

From the photostatic copies herewith, it is suggested that it will be apparent to this Honorable Court that the certificate of the Clerk is incorrect and incomplete. Compare Step Sheet, Photo Ex. 8, Pa. 1, 2.

The actual steps taken are as set forth in your petitioner's petition for writ of certiorari, filed July 15, 1946, under "Jurisdiction of This Court," page eleven, and in the supporting brief on pages fifteen and sixteen.

Your petitioner copied the steps from the file in this case in the office of the Clerk of the Court of Appeals of Kentucky immediately prior to the preparation of petitioner's appeal to the Supreme Court of the United States, which motion for appeal was entered on the steps on May 29, 1946, Photo Ex. 8, Pa. 2.

At that time the step sheet and file did not correspond, and your petitioner was then unable to find a few papers which she had previously seen. One paper missing from the file then was later found by the clerk in the chambers of the Chief Justice.

Further steps were taken by petitioner in an effort to get a final decision on her second petition for rehearing, which was first presented to the Court of Appeals of Kentucky on December 14, 1944, when the then Chief Justice Cammack told her "I will take it up with the Court in the morning."

It is suggested that the facts herein set forth will establish that petitioner did not have a final decision by the Court of Appeals until the denial of the order for appeal to the Supreme Court of the United States on June 11, 1946, per Step Sheet, Photo. Ex. 8, Pa. 2.

That order of denial, upon careful and diligent search your petitioner was unable to find in the file of the Court of Appeals of Kentucky when she next saw the file, April 22, 1947.

Receipt of said ORDER by the Clerk of the said Court is shown on Photo. Ex. 3, Pa. 1, 2.

Although the Clerk of the Court of Appeals of Kentucky states in the certificate, under his hand and seal, to this Honorable Court: "The foregoing is a true and correct copy . . . as the same appears from the records and files of my office," no mention of this appeal was made therein, therefore, petitioner respectfully refers this Honorable Court to the Step-Sheet of said file, Photo. Ex. 8, Pa. 2, which reads as follows:

5-29-46 Receipt of Appellee, Affidavit of Appellant, Statement to Appellee, Petition for Appeal from Court of Appeals to the Supreme Court of the U. S., praecipe for record, and the transcript for appeal to the Supreme Court—all placed with this record.

10-22-46 Order denying Writ of Certiorari to Supreme Court of U. S.—filed and recorded."

Also, see receipt for same, Photo. Ex. 10 (A).

Petitioner could not find in the file of the Court of Appeals on April 22, 1947, the order on which the denial of the appeal was written by the Chief Justice. She, therefore, requests permission to refer the Court to Photo. Ex. 9 of said order handed by your petitioner in person to counsel for respondent, Mr. Louis Seelbach, which shows:

"Copy received
filing objected to
June 7, 1946
Louis Seelbach, atty
for W. W. Downing."

Then, petitioner also respectfully requests permission to call this Honorable Court's attention to page four of respondent's brief, literary paragraph five, at page five, which states:

"She did not attempt to file such petition until July 15, 1946."

This is a misstatement, as the appeal papers were filed May 29, 1946, Photo. Ex. 8, Pa. 2.

On page one, literary paragraph two, of the opposing brief the respondent states:

". . . and no copy of the record and proceedings in the Court of Appeals has been filed."

Such was not done because your petitioner is of necessity proceeding in forma pauperis. The Court of Appeals of Kentucky refused to have her records copied when denying an appeal to this Court on June 11, 1946, and therefore your petitioner requested this Honorable Court to order the record sent to it by her petition for writ of certiorari.

THE PETITION WAS FILED IN TIME

On page two, literary paragraph three, under the heading: "1. Petition Was Filed Too Late," respondent states:

> ". . . the Kentucky Court of Appeals . . . on June 20, 1944, in the Spring Term, . . . affirmed the judgment of the Jefferson Circuit Court. It is further shown that on September 18, 1944, in the Fall Term of the Court of Appeals of Kentucky, this petitioner filed a petition for rehearing."

As shown by the Photo. Ex. 11, the petition for rehearing, attached to the receipt signed by Louis Seelbach counsel for respondent for copy of same, dated July 11, 1944, is stamped: "FILED July 12, 1944, E. E. Hughes C. C. A. Petition for Rehearing Overruled. Rees."

(Rees, Wm. H. Rees, Judge, now Chief Justice.)

The Kentucky law provides thirty days from the time of the decision in which to file a petition for rehearing. This photostatic copy shows the said petition for rehearing was filed but twenty-two days after the Court's decision.

Page three, literary paragraph one, the opposing brief states:

> ". . . no other action was taken by the petitioner until September 17, 1945, when the petitioner offered to file another petition for rehearing."

This is a misstatement.

Many steps were taken, including petition for rehearing, April 10, 1945, Ex. 12. Noted on Step Sheet, April 17, 1945. Photo. Ex. 8, Pa. 2:

> "Ordered filed and placed with the record."

The September 17, 1945 paper, was not a petition for rehearing, but a motion to set a day for hearing on the second petition for rehearing; seeking in person, action upon the motion tendered May 21, 1945. Photo. Ex. 13.

The May 21, 1945, motion is stamped "FILED Sept. 17, 1945, E. E. Hughes C. C. A." The word "FILED" is scratched, and "tendered" written over it, and shows: "Copy of Motion filed May 21, 1945." Photo. Ex. 13.

Your petitioner files her affidavit showing that when she copied the steps taken in this case from the files of said Court immediately prior to tendering her motion for Appeal to the Supreme Court of the United States, she did not see the word "tendered" written through the word "FILED." See affidavit. Ex. 6.

Petitioner further states that on September 17, 1945, she appeared in person before the said Court on the opening of the Fall Term, 1945, and asked to renew her motion of May 21, 1945. The then Chief Justice Henry Tilford, presiding, said, "Let it be filed." He did not say "tendered."

Petitioner had no notice of any action by the Court of Appeals of Kentucky on said motion after the Court filed same, and thereafter tendered a Supplemental Petition for Rehearing, Motion, and Affidavit, copy served upon appellee, W. W. Downing, October 22, 1945. Photo. Ex. 14.

Hearing nothing from her efforts to obtain a review, your petitioner, in this same term, on December 13, 1945, applied for an appeal to the Supreme Court of the United States, accompanied by affidavit, praecipe and dates of judgments sought to be reviewed. Photo. Ex. 15.

These papers were out of the file on three visits by petitioner to refer to said file, and were later found

by the clerk in the chambers of the Chief Justice of said court.

On page three, literary paragraph two, the opposing brief states:

> "Again on July 15, 1946, the Court of Appeals of Kentucky directed the Clerk of that Court not to make up a record for the purpose of appeal in forma pauperis to the Supreme Court of the United States . . ."

On June 11, 1945, your petitioner appeared in Court, in person, to see whether it acted upon the order for appeal.

Thereafter the Chief Justice, in your petitioner's presence, wrote on the Order,

> "Denied this June 11, 1946
> Wm. H. Rees,
> Chief Justice." Photo Ex. 9.

This denial, as stated above, was not in the file of the Clerk on April 22, 1947.

Why was this matter discussed by the Court on July 15, 1946, without notice to petitioner, and without her knowledge?

Petitioner's application for an appeal to the Supreme Court of the United States of May 29, 1946, had been denied on June 11, 1946.

The Spring Term of the Court ends in June. The motion for petition for writ of certiorari came directly to this Court, and is shown filed therein on July 15, 1946, together with copy for same receipted for by counsel for the respondent, on July 10, or 11, 1946.

Your petitioner respectfully calls attention of this Honorable Court to the certified copy of the papers marked, "ORDERS—KENTUCKY COURT OF APPEALS" to page fourteen, which reads:

"ORDERS . . . KENTUCKY COURT OF APPEALS

Special Session TERM July 15, 1946

Everett v. Downing Jefferson

The appellant having filed with the Clerk of this Court a praecipe requesting certain pleadings in this record be copied and prepared for the purpose of an appeal to the Supreme Court of the United States, and further filing her affidavit requesting that she be permitted to proceed in forma pauperis, and the Clerk requesting to know if he should make said record, and the Court being advised, decided that he should not make the record, because the appellant was not in time for an appeal."

Petitioner first knew of the above order when found in the files of the Supreme Court in Washington, D. C., April 18, 1947.

Your petitioner has just now found a letter, mixed with personal papers received during a severe illness which began July 13, 1946, and continued for many weeks, from Mr. H. H. Harned, Sergeant-At-Arms of the Court of Appeals of Kentucky dated, July 15, 1946, in which he returned to her her Affidavit and Praecipe for Record, which had been included with the other papers for appeal tendered on May 29, 1946. Photo. Ex. 10 (B). Dr. Coon's affidavit, Ex. 16.

On the Praecipe for Record, has been written in ink, "Tendered 7-15-46." Photo. Ex. 10 (B).

This was the day of the special session, of which your petitioner had no notice or knowledge. See "ORDERS . . . KENTUCKY COURT OF APPEALS," page 14, in file of office of Clerk of this Court.

The said letter of July 15, 1946, made no mention

of the Court's consideration of your petitioner's case at the special session.

The petition for appeal had been denied on June 11, 1946, copy of said order for appeal is Photo. Ex. 9, and shows "Copy receipted for, filing objected to June 7, 1946, Louis Seelbach, Atty. for W. W. Downing."

FEDERAL QUESTION WAS RAISED IN BOTH LOWER COURTS

On page five, literary paragraph two, the opposing brief states:

> "At no time, in the Jefferson Circuit Court or in the Court of Appeals of Kentucky, either on the original appeal or on the petition for rehearing, was there ever any title, right, privilege . . . specially set up or claimed by either party under the Constitution."

The Federal question was specially set up at the start of the trial by the trial court itself, when it said to your petitioner's counsel:

> "We want to get any fact that you have, Judge, relative to this mental condition—any time prior to the investment of this money."

The words "mental condition" in connection with "investment of this money" raised a question exclusively for the jury, and when the trial court usurps the province of the jury in such a case the Federal jurisdiction is involved.

The first fact in this cause of action, before the trial court, was the obtaining of the alleged contract of employment by this respondent under circumstances which convinced Mr. Claude Hudgins that she was not

capable of making a contract. See quote, page 21, herein.

The trial court excluded this as being irrelevant, yet permitted the respondent to testify about it.

Counsel for petitioner in this case began his brief to the Court of Appeals of Kentucky:

> "IF EVER THERE WAS A CASE FOR THE JURY THIS IS SUCH A CASE."

Both the State and Federal Constitutions guarantee trial by jury, especially where incompetency is involved.

That raised the Federal question.

The record shows that petitioner's counsel emphatically argued through the proceedings in the trial court and in the Court of Appeals of Kentucky the case of Franzman's Ex'rs v. Nalty, 208 Ky. 686, 271 S. W. 1034, and that said case was stressed in the motion for new trial, and in every step taken by your petitioner in the Court of Appeals of Kentucky.

The decision of the Franzman case, is, in part, as follows:

> "The testimony of nonexpert witnesses as to testatrix's mental capacity is not entitled to probative effect beyond that justified by facts to which they depose concerning acts, conduct, and conversation of testatrix.
>
> "The professional opinion of physicians and alienists concerning mental condition of testatrix, even though based on facts which may not in the opinion of laymen or even court induce belief and opinion expressed by expert presents question for jury.
>
> "In will contest for mental incapacity, evidence HELD to make question of testatrix's mental capacity one for jury."

2. THE OPINION OF THE COURT OF APPEALS OF KENTUCKY IS CONTRARY TO THE LAW AND THE FACTS SHOWN BY RECORD.

The opinion abounds in misstatements.

On page five, literary paragraph one, the opposing brief states:

> "We will not attempt to go into the facts of the case, as both the facts and the law are set forth in the opinion of the Court."

The opinion misstates the facts, and the law, and it is this opinion and its statement of the facts and the law as rendered by the Court of Appeals of Kentucky to which your petitioner so strongly objects, and which she has continuously attacked.

Your petitioner was loath to believe that the highest court in the State would not correct such misstatements as appear in the opinion adopted by said Court as its decision, therefore, she continuously laid before the Court new facts and new law in her effort to obtain a review of the case, and have its erroneous opinion rescinded.

Your petitioner respectfully requests permission to call this Honorable Court's attention to only a few of the discrepancies therein. For example:

On page one of the opinion, literary paragraph one, of the typewritten copy which was sent to counsel for petitioner by the Clerk of the Court of Appeals of Kentucky, which copy is appended to your petitioner's petition for writ of certiorari, is stated:

> "Upon her return to Louisville she took up her abode at the Kentucky Hotel, and was visited by a representative of the railroad company who proposed a settlement by payment of $10,000."

This indicates your petitioner acted upon her own volition, and that the offer was made in Louisville, which is not the fact.

The record discloses that the railway representative visted petitioner and her physicians in Hot Springs, Arkansas, and offered her there, $10,000, and that her attending physician, Dr. J. L. Greene, said that amount was not enough for her damages, and she was invalided to Louisville, with memoranda instructions from the physician to call friends to see her. R 12, A. 15. And Hot Springs depositions, Ex. 4, Numainville, page 42. Harmon Stipulation, Pho. Ex. 17.

(This stipulation is filed in the record in Jefferson Circuit Court, but was omitted from the transcript to the Court of Appeals.)

On page two, literary paragraph one, the opinion states:

> "Appellant objected to the percentage of the total, since she had been offered a settlement as above stated. The contract was then interlined so as to limit the per cent to any sum above the first $5,000."

The record reveals that your petitioner had no knowledge of the interlineations in the contract until some years afterward. R. 14.

On page one, literary paragraph two, the opinion states:

> "Following the offer appellant called an attorney with whom she discussed her injuries . . . they agreed that she was entitled to a larger sum."

The attorney referred to in the opinion, Mr. Claude Hudgins, then Assistant District Attorney for

the United States, Western District of Kentucky, whom your petitioner had known prior to her accident, testified:

> ". . . she was not the same woman. She was off, but I talked to her some time, and stated in my own mind what to do about it . . . I did not think she had mental capacity enough to contract; and I did not contract with her that evening; I wanted to think about having a committee appointed for her."

Under cross-examination Mr. Hudgins testified to the question:

> "Q. She told you about the accident?
>
> "A. Well, she tried, and she just talked at random so I could hardly get a picture of what happened." R. 96, 97.

The opinion, page two, literary paragraph one, states:

> "As to what immediately followed there is some discrepancy though not of material importance."

And on page four, literary paragraph two:

> "There is a slight but immaterial disagreement as to what led up to the stock purchase."

This Honorable Court has held in Carlson v. Curtiss, 234, U. S. 103, 106:

> "Neither of the state courts passed upon this evidence; doubtless because, under their respective views of the applicable law, the facts referred to were immaterial. But this omission does not relieve us of the duty of examining the evidence for

> the purpose of determining what facts reasonably might be, and presumably would be, found therefrom by the state court, if plaintiff in error's contention upon the question of federal law should be sustained, and the facts thereby shown to be material."

While the subject matter is entirely different from this case, your petitioner finds under "immaterial" the case of Dahnke-Walker Co. v. Bondurant, 175 Ky. 774; 257 U. S. 282, 292, 42 S. Ct. 106, 66 L. Ed. 239, in which this Court reversed the Kentucky Court of Appeals on a principle applicable to this case at bar, and said:

> "The Court proceeded on the theory that, the contract was made in Kentucky, related to property then in that State and was to be wholly performed therein, the transaction was strictly intrastate and not within the reach or protection of the commerce clause of the Constitution of the U. S.; and this although the wheat was to be delivered on board the cars of a public carrier and the plaintiff intended to ship it to Tennessee as soon as it was so delivered."

The Dahnke-Walker v. Bondurant case was argued March 18, 1921; restored to docket for reargument June 6, 1921; reargued October 10, 1921, and reversed.

The opinion, page four, literary paragraph two, states:

> "On June 29, 1929, a check was sent to the Arkansas Trust Company for $20,000 with instructions to secure a release; have Miss Everett endorse the check and place the proceeds to her credit after sending appellee a check for $3,750. This was accomplished by a bank employee, who went to the hospital. He had appellant sign what

is styled mutual release and receipt between Lillian B. Everett and W. W. Downing."

The opinion disregards the evidence of the banker, Mr. Dewell Jackson. (Hot Springs Depositions, Ex. 4, page 46), who testified:

> "She was in bed, and as I recall it, had ice packs to her head . . . She seemed confused and she cried; she made strange signs with her hands and occasionally pressed them to her head; she did not talk much and her speech was broken; she looked like a very sick woman to me . . . I wouldn't know whether she was in a position to understand or not . . . she finally signed it. She did not give instructions about her funds. She seemed confused."

Your petitioner respectfully insists that any release obtained under the above conditions cannot be called a "mutual" release, a meeting of minds being impossible.

The opinion further misquotes the facts from the record, on page four, paragraph two, stating:

> "Appellant said that on one of appellee's visits to Hot Springs, he said: 'When you get your money someone will have to invest it for you,' and appellant replied, 'Someone will have to.' Appellant said that she made the suggestion, and that some one would have to advise her."

Instead of the above, the record shows that petitioner stated:

> "He said: 'When you get your money I'd like to invest it for you." R. 21.

The attention of this Honorable Court is called to the wide discrepancy here shown, since the record re-

veals your petitioner could not, and did not, take the initiative in making any suggestions on any subject.

This is especially shown by every witness in the Hot Springs depositions, including Sister Sebastian's, now of Fort Smith, as follows:

Sister Sebastian, Photo. Ex. 2, A. 37, R. 196:

". . . I can truthfully say that Miss Everett was not capable of transacting any business while under my care. She was in a perfectly helpless condition because she couldn't think for herself."

". . . and it was difficult for her to make herself understood. She had difficulty, also, in understanding what we were speaking about when we talked to her, and she did not seem to comprehend everything that was going on." Photo. Ex. 2, A. 12, R. 192.

Sister Delphine, Hot Springs Deposition, Ex. 4, page 10, A. 1:

"I recall one occasion when Miss Everett received a letter which greatly upset her and Sister Sebastian stopped helping the nurses prepare lunch trays to compose a letter and gave the draft to me to type.

"On another occasion Miss Everett had received a very bulky paper from Mr. Downing, I recall seeing Doctor Greene and Miss Everett together, and, on the instruction of Doctor Greene, I returned the papers to Mr. Downing. Miss Everett could not understand them.

". . . I went to her room and put some correspondence of hers in an envelope, addressed it to Doctor Greene, and sent it by a messenger to his office so that Doctor Greene might have the correct information . . . Mr. Downing had been here and knew how helpless she was . . . She received no word from Mr. Downing to relieve her

anxiety. She continued to be so upset that sometime later I asked her to permit me to write a telegram for her. I do not remember the words, but it was to Mr. Downing asking his cooperation in giving her relief . . . Miss Everett did not ask me to write. She could not ask for specific things to be done." Page 10, A. 2.

Sister Bernard, Superintendent, St. Joseph's Infirmary, P. 51, A. 3:

". . . Her physical condition was serious; she was very sick and suffering great pain; she had been in an accident, and her mental condition was bad.

"Well, her condition was never much improved; she was worse after I brought her back to the hospital from the train, and remained so for many months . . ." P. 54, A. 4.

". . . and we take accident cases and take care of them. Doctor Greene was most kind and thoughtful and considerate of his patients and of us Sisters too—he was a wonderful man—and if there had been any danger of Miss Everett being dangerous to herself—you know—of doing anything to herself or doing anything to anybody else, he wouldn't have kept her here, but we could take care of her. She wasn't violent, she was just restless and fatigued and hurting. She seemed to be in pain all the time, and she was nervous. P. 56, A. 4.

"Q. 5. Was she able to discuss common subjects with intelligence?

A. I wouldn't say so; not connectedly; she would talk to you and then go off on something else. P. 56.

"There were times when she was much worse than other times, but she was never anything like a normal person to me." P. 57, A. 3.

Leon Numainville, Passenger Agent, P. 42, A 6, of Ex. 4.

"She had to travel in bed, and when I was notified that she was leaving, I had a berth made ready for her and notified the passenger agents at points of change to meet her.

"I found her quite confusing and nervous. Her statements were disconnected . . . She was in bad shape then." P. 43, A. 3.

Winona Bird-Biggs, Nurse, P. 29, Ex. 4, Hot Springs Depositions:

"Yes, I recall Mr. Downing was in Miss Everett's room one day about noon and asked to see the Sister in charge of the floor. It was one of the days when we could not disturb Miss Everett to give her routine care. She was rigid with pain, crying and incoherent, that is, talked disconnectedly. That was her condition when Mr. Downing saw her and it was her usual condition on her bad days . . . He must have seen it; no one could have seen her without observing it.

". . . and I hurried to find Sister Sebastian, and Sister went to Miss Everett's room. He soon came out with Sister and they talked in the hall. A. 5, at P. 30.

"She could not keep her mind on one subject. She simply could not be talked to long at a time nor she couldn't read either. P. 30, A. 3.

"She might use the telephone if someone called her, but she couldn't take the initiative and make a call. She never asked for specific things to be done for her. She did nothing unless someone offered or suggested a thing. P. 31, A. 1.

"No, indeed, not while she was in the hospital; she was not able to talk business while she was in the hospital. She wasn't able to comprehend

business matters; she didn't even open her letters or anything like that. P. 31, A. 2.

". . . Letters were never answered unless someone offered to answer it or suggested what to say. The letters just piled up in a drawer unopened. P. 31, A. 3.

"Yes, but she couldn't compose a letter, she couldn't even copy one that someone had composed for her, unless someone sat by her to guide her so she wouldn't mix up the lines." P. 32, A. 1.

The opinion, page six, literary paragraph three, casting this material aside, states:

"There are many side lights which might be mentioned in detail, but to do so would take too much time and space. These are evidenced by letters and other exhibits filed, filling several volumes of transcript along with the mass of testimony, some which relate to matters occuring before, and some after the transaction, held incompetent by the court."

Your petitioner has heretofore given excerpts from the "mass of testimony" showing the pertinence and importance of such material.

Instead of petitioner introducing evidence after the transactions, such was only introduced by the respondent.

The record in this case consists of three volumes, with some loose papers therein. One volume is the Hot Springs, Arkansas, depositions, which petitioner supplies herewith, with the court rulings. Another volume is the exhibits, consisting of depositions and letters. The other volume, is the transcript of proceedings in the trial court.

Your petitioner is supplying this Court herewith, a copy of the transcript of proceedings in the trial

court; the Amended and Substituted Petition; Answer to same; Reply; Amended Petition to Amended and Substituted Petition; Motion for New Trial; Brief for Plaintiff on Motion for New Trial; judgment; to which is attached ruling on deposition of Ada Everett, as follows:

> "be stricken from record because relates to facts subsequent to those involved in this action herein, to which plaintiff excepts,"

and other proceedings rulings; Order for Appeal; Brief for Plaintiff, for the Court's use if desired.

The opinion ignores the evidence of Miss A. M. Everett, sister of petitioner, which was excluded by the trial court as being after the transactions involved, while in fact it was during the continuance of the transactions.

The record shows the deposition of this witness, who was in Louisville on a short visit from California while your petitioner was still in the infirmary at Hot Springs, that she called to see the respondent in July, 1929, and remonstrated with him for speculating with her sister's money. The respondent ignored her warning, and in September, 1929, just before the crash, made the final investment of petitioner's funds, which were lost. See Photo. Ex. 5.

The opinion page seven, literary paragraph three from page six, states:

> "Appellant was adjudged to be competent later in 1935; and the instant suit was filed in December, 1941."

She was adjudged competent August 22, 1941, as shown in appellee's brief, page nine, to the Court of Appeals:

"She further claimed that she had been adjudicated sane by the County Court of Nelson County, Kentucky, on August 22, 1941, and this suit was filed shortly thereafter."

The opinion page seven, literary paragraph three from page six, states:

"Her committee thereafter instituted suit in the Federal Court seeking to set aside the compromise settlement, and the court held that she had failed to make a case."

The opinion has taken this material from appellee's brief.

This material was specifically excluded before the trial, and should not have been considered by the Court.

Your petitioner's counsel replied to appellee's brief, page two of the Reply Brief:

"This counsel is not responsible for the failure of other counsel to sufficiently adduce the evidence of the glaring incapacity of the appellant in such other case." Ex. 12, Pa. 4.

THE LAW IS MISSTATED AND MISAPPLIED.

The opinion page seven, literary paragraph one, states:

"The question presented turns on the application of law to the facts, and the solution might be decided on strictly technical ground,"

And in the last line on the page states:

> "Section 386.020 K.R.S. then K.S. Section 4711-1 defines 'fiduciary', and it is clear that appellee did not come within the definition."

Your petitioner respectfully refers this Honorable Court to the Kentucky Revised Statutes to show that Section 386.020 does not define fiduciary, but Section 386.010 does, and reads as follows:

> "(1) 'Fiduciary' means any trustee, guardian, executor, administrator, committee, or individual or corporation holding funds or otherwise acting in a fiduciary capacity."

The opinion, page eight, literary paragraph one, states:

> "The most that could be made of the relationship would be that of principal and agent, and the elements are not such as to create that relationship."

25 Corpus Juris 1118, "FIDUCIARY" c. (6) Fiduciary capacity, states:

> "Cases may undoubtedly occur in which it may not be easy to determine when such capacity exists. 24, the term is not restricted to technical or express trusts; 25, it may include such offices or relations as those of agent; 26, attorney at law; 27 . . . or indeed anyone in whom is reposed a trust such as is usually reposed in these persons in their ordinary or regular business."

AUTHORITIES FOR RESPONDENT DO NOT APPLY.

The opinion, page ten, literary paragraph one, discusses the case of Reilly v. Fleece, 259 Ky. 330, 82 S. W. (2) 341, and states:

> "Fleece, an attorney, held a power of attorney from Lucy Reilly, authorizing him to invest and reinvest her funds . . . This case, of course, was free of the element of disability or knowledge of disability, a matter already disposed of."

It is the matter of disposal of the "element of disability, or knowledge of disability" by the said Court in this case to which your petitioner so strongly objects, in view of the "mass of evidence," excerpts of which are cited herein.

The opinion, page ten, literary paragraph one, also states:

> "While the facts are not precisely similar in Armstrong v. Citizens Union National Bank, 269 Ky. 171, 126 S. W. (2) 630, where a person bought bonds at the recommendation of the cashier . . ."

That case is not applicable in this cause.

The securities here were bought and paid for by, and delivered to, the respondent himself.

Such being the case he certainly was acting as petitioner's agent and in a fiduciary capacity. Further, he was acting upon his own judgment. See Sister Sebastian's wire, Photo. Ex. 18.

The opinion, page ten, literary paragraph one, states:

> "The case comes down finally to the proposition that appellee recommended, and appellant bought speculative stocks."

The record shows that respondent's own witnesses, the brokers testified that respondent bought the stocks, paid for them, and that they were delivered to him. R. 162. Respondent testified he didn't. R. 147.

The opinion, page eight, literary paragraph two, states:

> "It is true that in the preparation of the case appellee took depositions of other physicians, and some nurses who had attended appellant in an effort to make the case as forceful as possible. He was trying to establish permanent disability . . ."

This statement is untrue.

To the contrary, no such claim is made by the appellee himself.

The appellee took no depositions of any nurses, nor other doctors. He took only the depositions of Drs. Greene and Scully, and took them at Dr. Greene's request, as shown supra.

On page eleven, literary paragraph one, the opinion states:

> ". . . appellant endeavored to prove by the witnesses a condition based on the opinion or statement of doctors, none of whom were introduced; these depositions were not offered in such manner as to constitute competent evidence. Even had they been they would not have thrown light on the main issue here, that is, whether or not the mental disability of appellant was so obvious as to put appellee on notice."

The record shows that the doctors were introduced by deposition; not in person because of lack of funds. In addition, the principal physician, Dr. J. L. Greene, was dead; Dr. J. R. Peters was in the Naval Service at Bethesda, Maryland. Dr. J. H. Baldwin, of Indiana, cross-examined by counsel for the respondent,

gave a complete history of the case beginning with his first-aid treatment after the accident, including a complete history of her case while under the care of other doctors, and nurses, in the form of depositions, cross-examined by counsel for respondent, which were fully competent and admissible under all the authorities cited in the record, showing the continuous incompetency. See Jones on Evidence, Section 699.

Dr. Baldwin testified to petitioner's condition during the time of his contact with her covering the period of the final investment by the respondent in 1929.

In cross-examination he testified to the final question of respondent's counsel:

> "No, if you were meaning insane; if you mean her utter inability to handle herself and her affairs understandingly then the answer is definitely yes; as I have previously described in this testimony." Photo. Ex. 19, Pa. 4-5.

In an effort to avoid burdening the Court, your petitioner obtained, from the files of the Court of Appeals of Kentucky, only three sheets of Dr. Baldwin's deposition in photostatic copy, including the certificate, with the rulings of the court thereon. Photo. Ex. 19.

Petitioner likewise obtained two sheets of photostatic copy of the deposition of Dr. J. R. Peters, specializing in neuro-psychiatry, stationed at the Bethesda Naval Hospital at the time, in which he states his personal experience with petitioner, and cities history obtained by him. Photo. Ex. 21. This deposition was excluded by the trial court.

Dr. Peters states:

"In my opinion, this clearly shows Miss Everett's condition during the years 1928 and 1929, and I believe it is true that at that time she was incompetent.

"Even now with her Committee removed, she has to have considerable assistance to carry on business transactions which to a perfectly normal person might appear to be quite simple.

"I should like to state also that due to the organic brain injury, she is still confined much of the time, especially when compelled to consider her problems, and when she must meet new situations. She still needs much consideration, as she still hesitates in her speech, and is rather slow to grasp meanings. One must be patient with her to reach a thorough understanding."

Doctor Peters quotes from the history given by Dr. Scully in which Dr. Scully said:

"It is thought that there were changes in the rest of the brain also and that these changes had resulted in her change of personality, in her emotional state and in her inability to carry on business . . . Photo. Ex. 20.

"The disturbed function of the brain in her case as compared with a normal brain was shown by the athetoid movements of her hands, grimaces of the facial muscles, the confusion of mind, the easy disturbance of the emotions, and her inability to relax and have normal sleep."

This Court in the case of Southern Pacific Co. v. Schuyler, 227 U. S. 601, 611, decided the finding of fact which is without support in the evidence, as follows:

". . . and while it is conceded that ordinarily, upon writ of error to a state court, this court does not review the findings of fact, yet it is insisted

that in this case a Federal right has been denied as the result of a finding of fact which is without support in the evidence; that the evidence is before us in the record by which that insistence may be tested; and that the status of Schuyler as an inter state passenger is a mixed question of law and fact so that it is incumbent upon us to analyze the evidence to the extent necessary to give to plaintiff in error the benefit of its asserted Federal right. The insistence as to the power and duty of this court in such a case is well founded."

In the face of this "mass of testimony," opposed solely by the respondent and five witnesses, none of whom ever saw your petitioner while in the infirmary in Hot Springs, Arkansas, the Court of Appeals of Kentucky affirmed the judgment of the trial court, who gave the following instruction to the jury, in part:

"Mr. Downing's—a practicing attorney, reputation before the Bar, and amongst the people generally of Louisville, for him to have to explain, . . . The Court is of the opinion that these letters and correspondence existing between—which it is claimed to have been written by Miss Everett, which she denies,—but it is a fact somebody must have written them, and evidently she was the dictator of some of them, if not all of them. Now, with that preponderance of evidence . . . So, will one of you sign it? As this is not your verdict, it is mine."

This handling of the cause here seems parallel to the decision of this Court in the case of United Gas Public Service Co. v. State of Texas, 303 U. S. 143, 82 L. Ed. 717, 58 S. Ct. 493:

"To us the proceedings in the state courts seem an empty show."

IRREGULAR PROCEEDINGS IN THE COURT OF APPEALS OF KENTUCKY

Your petitioner is emboldened further to press for a rehearing of this case because of the following unusual proceedure:

After submitting an order for appeal at the request of the Court of Appeals of Kentucky, same was denied on June 11, 1946. Photo. Ex. 22, and 8.

This order denying the appeal is missing from the file of the Clerk of the Court of Appeals of Kentucky. Ex. 6.

All of the papers for the Appeal to the Supreme Court of the United States, May 29, 1946, except the Praecipe for Record and Affidavit in forma pauperis were returned to petitioner a few days following the denial for appeal, on June 11, 1946. Photo Ex. 10.

On July 11, 1946, petitioner forwarded to this Court a Petition for Certiorari, with receipt from opposing counsel for copy of same.

On July 15, 1946, the Sergeant-At-Arms of the Court of Appeals of Kentucky returned to petitioner the Affidavit and Praecipe for Record. The Praecipe was marked, "Tendered 7-15-46," Photo. Ex. 10-B, which was the date of a special session of the said Court, of which petitioner had no notice, or knowledge, and there was nothing then pending before the said Court pertaining to her cause. Photo-Ex. 10. Steps, Photo-Ex. 8.

Your petitioner knew nothing of the Special Session until finding the order in the files of the Clerk of this Court in Washington, D. C., April 18, 1947.

CONCLUSION.

WHEREFORE, your petitioner feels that at no time has she had a hearing on the merits of her case, and she respectfully urges this Honorable Court to examine the photostatic copies of the records filed as exhibits herewith in connection with this petition, and get a true picture of her contentions, not the distorted one presented by the statements of opposing counsel in this, as well as the lower courts.

Petitioner comes to this Honorable Court as a last resort and begs its indulgence in her behalf for a reversal of this cause.

Respectfully submitted,

LILLIAN B. EVERETT,
Petitioner in Person.